BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN

Petition of Wisconsin Bell Inc. for a Section 271 Checklist Proceeding	))	**Docket No. 6720-TI-170**

JOINT CLEC COMMENTS ON PUBLIC INTEREST CONCERNS RELATING TO SBC WISCONSIN'S PROPOSED "COMPROMISE REMEDY PLAN"

AT&T Communications of Wisconsin, L.P., TCG Milwaukee ("AT&T") and WorldCom, Inc. ("MCI") (collectively, "Joint CLECs") hereby submit their comments on public interest concerns relating to SBC Wisconsin's proposed "Compromise Remedy Plan," as directed by the Administrative Law Judge's June 17, 2003 Order in this proceeding. Furthermore, Joint CLECs also advise the Commission of continued SBC billing problems addressed in SBC Accessible Letters issued subsequent to April 28, 2003, when Joint CLECs filed their reply comments on these matters.

Introduction

As this proceeding draws to a close, the Commission has directed the Joint CLECs to file comments and affidavits on the subject of the public interest as it relates to the "compromise remedy plan" addressed in the February 14, 2003 Affidavit of SBC's James D. Ehr. While the Commission has solicited comments on rather short notice, it should by no means limit itself to a cursory review of the matters under consideration here, which are critical to the determination of whether the Wisconsin market is "fully and irreversibly open" to competition. Instead, the Commission should undertake a meaningful analysis of the impact of the current status of the Commission-ordered remedy plan, and of the SBC-proffered, watered-down "compromise remedy plan" sponsored by Mr. Ehr. Indeed, the very label "compromise" is a misnomer, since the

SBC-proposed remedy plan certainly does *not* represent a compromise among SBC, the Commission and the vast majority of CLECs in Wisconsin. Indeed, only *two* CLECs in the entire state have adopted the plan proposed by SBC. One of these two CLECs – Time Warner Telecom – is today filing separate comments addressing why that plan, which Time Warner adopted for individual reasons, is not an appropriate "one size fits all" plan for Section 271 backsliding purposes. The Commission should find notable that neither TDS Metrocom nor Time Warner Telecom adopted the "compromise" plan in Illinois until forced to do so.[1]

More notably, when compared to the remedy plan ordered by the Commission in Docket 6720-TI-160, the "compromise remedy plan" sponsored by Mr. Ehr vastly reduces the remedy payments for which SBC would be liable in the event of backsliding on wholesale service quality, greatly reducing any post 271-entry incentive that SBC has to fulfill its obligations to competitive carriers. Most significantly, the "compromise" plan slashes Tier 2 remedies – those paid to the state when SBC fails to provide acceptable wholesale service – to a negligible amount, virtually eliminating the Commission's intended protection of Wisconsin consumers, who deserve access to quality telecommunications services from their chosen carrier. Without assurances of adequate wholesale service, the Commission cannot advise the FCC that granting SBC Wisconsin 271 authority is in the public interest.

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[1]By order dated May 13, 2003, the Illinois Commerce Commission ("ICC") recommended to the Federal Communications Commission ("FCC") that a plan modeled on the "Compromise" Plan be used for purposes of assessing compliance with Section 271. (Order, ICC Docket No. 01-0662) (hereinafter, "Illinois 271 Order"). Notably, after hearing months of briefing, the ICC (1) retained the existing ICC-crafted plan for existing interconnection agreements; and (2) ordered numerous changes to the "Compromise" Plan that slightly improve it (but still do not eliminate its many fatal defects, as is discussed later in these comments). Order, ICC Docket No. 01-0662, ¶¶ 3519-3521 (May 13, 2003). Given the few days allotted to the issue here, of course, such an outcome is not feasible.

SBC also ignores the fact that this Commission has already applied the FCC's "public interest" criteria and carefully crafted its own remedy plan to meet the public interest purposes of preventing backsliding and promoting competition. This Commission has soundly rejected the Texas remedy plan (which is the basis for the feeble "Compromise" Plan) and numerous onerous provisions that remain in SBC's "compromise" plan. SBC's plan, in short, flagrantly violates this Commission's orders absent any justification, albeit premised on SBC's mantra of conceding nothing until its appeals have run and its obligations are "final and non-appealable."

In a very real sense, the fate of SBC Wisconsin's 271 entry will have final and unchangeable effects on the Wisconsin local exchange market. No longer will SBC's misbehavior be tempered by its incentive to enter the long-distance market. An effective remedy plan, however, is one of the best tools available to this Commission to ensure against backsliding, while giving SBC a continued monetary incentive to comply with its obligation to provide nondiscriminatory access to network elements.

Joint CLECs are fully aware that SBC has ratcheted up its demands for 271 approval of late, in light of the June 19th filing of its *fourth* Michigan 271 application at the FCC, and the fact that the five states in the former Ameritech region are among the six that have not already obtained 271 authority from the FCC. Joint CLECs urge the Commission not to bow to external pressures that have nothing to do with the substance of SBC's Wisconsin application, and to analyze the evidence on the merits. In the end, there is no reason for the Commission to waver from its previous decisions and condition any positive recommendation on SBC Wisconsin's 271 application on SBC's adoption of the Commission-approved remedy plan and dismissal of all appeals contesting that plan.

To do any less will effectively negate the years of hard work the Commission and its staff have committed both to crafting a Wisconsin-specific remedy plan, and to defending numerous orders from SBC's latest string of scorched earth appeals. Indeed, to cave to SBC's political pressure and adopt the "dumbed-down" "compromise" plan will reward SBC and its imported Texas-based strategy of using and abusing the regulatory and court system to fight competitive choice for its long-suffering monopoly ratepayers.[2]

Discussion

I. The PSCW-Ordered Remedy Plan from Docket 6720-TI-160 Is the Appropriate Plan to Prevent Backsliding in SBC Wisconsin's Wholesale Service

By order dated September 25, 2001 in the OSS docket (6720-TI-160), the Commission established a remedy plan for SBC Wisconsin.[3] As the Commission is well aware, it developed that plan by making a number of improvements to the Texas Remedy Plan proposed by SBC Wisconsin in the OSS proceeding, including:

1) Rejecting SBC Wisconsin's proposal to lower remedies by having statistical testing on benchmarks;

2) Eliminating the biggest exclusion on remedies in the Texas Plan, the so-called "K-table;"

3) Requiring a comparison of SBC Wisconsin's retail and "CLEC" affiliates for purposes of establishing remedies;

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[2] *See, e.g., Southwestern Bell Telephone Company v. AT&T Communications of the Southwest, Inc. et al.*, 1198 WL 657717 (W.D. Tex. 1998), where U.S. District Court Judge Sparks held: " The undersigned must note, however, that it was somewhat troubled by SWBT's [Southwestern Bell Telephone Company] tactics in this case. SWBT's penchant for rehashing issues that had already been fully briefed, raising arguments and claims that did not appear in even the most generous reading of the Amended Complaint, and, most importantly, taking positions in this litigation that it had expressly disavowed in the PUC administrative hearing, were, to say the least, distressing. The voluminous briefing in this case – over seven hundred pages in total – could probably have been cut in half had SWBT not fought tooth and nail for every single obviously non-meritorious point."

[3] Hereafter the "OSS Order."

4) Eliminating SBC Wisconsin's proposal to allow unilateral withholding of remedies because of its claim that CLECs are somehow acting in bad faith, and instead requiring SBC Wisconsin to first prove such an allegation;

5) Ruling that the existence of a remedy plan does not affect availability of other remedies and rights of the CLECs;

6) Rejecting SBC Wisconsin's proposal forcing CLECs to prioritize remedies, with all performance measurements having "low" priority;

7) Rejecting SBC Wisconsin's proposal forcing CLECs to amend their interconnection agreements to obtain remedies, and instead making the remedy plan immediately available upon Commission adoption;

8) Agreeing with the CLEC proposal that SBC Wisconsin directly pay remedies to CLECs, not merely credit their account;

9) Implementing a "per occurrence" methodology for calculating remedies that requires SBC Wisconsin, in those instances where it provides inadequate service to CLECs, to pay remedies for *all* transactions, not only "misses;" and

10) Implementing Tier 2 remedies that would provide essential incentives to SBC to provide quality service beneficial for Wisconsin consumers who obtain telecommunications services from CLECs.

The Commission plainly felt that these modifications to the SBC proposal were necessary to create a remedy plan that served its intended purpose – to secure appropriate wholesale service quality, promote competition, and provide competitors some assurance that SBC would not abuse its monopoly position as possessor of "last mile" facilities by providing substandard wholesale service. Indeed, the Commission-ordered plan was an important step in the opening of the local telecommunications market, and would definitely provide anti-backsliding assurances that are so critical to the public interest examination. While neither SBC nor the CLECs were completely happy with the ultimate outcome of 6720-TI-160, the Commission adopted its wholesale remedy plan after a full and fair evidentiary proceeding.[4]

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[4] As the Commission recalls, the CLECs proposed their own plan in that proceeding. The CLEC proposal was not adopted.

The “compromise remedy plan” offered up by Mr. Ehr fulfills none of these key Commission objectives or processes. In fact, as discussed below, on its face that plan is inconsistent with what the Commission has determined the public interest to require, in numerous significant respects.

This is of particular concern as the Commission evaluates the public interest portion of this proceeding, since SBC Wisconsin appealed the Commission’s remedy plan order to circuit court. Relying entirely upon Wisconsin law, the circuit court judge ruled that the Commission lacked authority to impose the unique per-occurrence methodology, and invalidated the critical remedy payment provisions of the Commission-ordered plan. However, the judge did not overrule the admirable goals set and achieved by the Commission.

The Commission and certain CLECs have appealed this lower court decision to the Wisconsin Court of Appeals, and a final decision is expected in 2003.[5] However, in the meantime, due to the vacatur of SBC’s obligation to make Tier 1 and Tier 2 remedy payments, there is no practical effect to the Commission-ordered remedy plan, and the Joint CLECs – and Wisconsin consumers – have no means by which to ensure adequate wholesale service quality from SBC. This should be of grave concern to this Commission as it considers the public interest aspect of SBC Wisconsin’s draft 271 application.

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[5] In the pending appeal, SBC challenges the Commission’s authority to impose a remedy plan on SBC. That is not the matter at issue here. Rather, at issue here is whether the Commission will recommend the approval of SBC’s planned 271 application to the FCC. In reaching that recommendation, the Commission must consider what remedy plan is required in the public interest in order to ensure against backsliding by SBC. Whatever the outcome of the pending appeal, the Commission can and should find here, as it has in the OSS docket, that the safeguards incorporated in the Commission’s approved remedy plan are required in the public interest. The pending appeal does not in any manner limit the Commission’s ability under the 1996 Act to affirm its earlier public interest determination on this issue. *See, also,* Section III.A.2, below.

II. The Public Interest Requirement

The FCC has stated that in addition to determining whether a BOC has satisfied the 14-point competitive checklist addressed above, "Congress directed the Commission to assess whether the requested authorization would be consistent with the public interest."[6] The FCC has deemed the public interest analysis an *independent element* of the statutory checklist, and has stated that it requires an *independent determination*.[7] The FCC "views the public interest requirement as an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will therefore service the public interest as Congress expected."[8]

The FCC has provided a non-exhaustive list of matters that could be considered:

> Among other things, the Commission may review the local and long distance markets to ensure that there are not unusual circumstances that would make entry contrary to the public interest under the particular circumstances of the application at issue. Another factor that could be relevant to the analysis is whether the Commission has sufficient assurance that markets will remain open after grant of the application. While no one factor is dispositive in this analysis, the overriding goal is to ensure that nothing undermines the conclusion, based on the Commission's analysis of checklist compliance, that markets are open to competition.[9]

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[6] *See Application by SBC Communications Inc., Pacific Bell Tel. Co., and Southwestern Bell Communications Services Inc., for Authorization to Provide In-Region InterLATA Services In California*, WC Docket No. 02-306, Memorandum Opinion and Order, Appendix C (FCC 02-330 Rel. Dec. 19, 2002) at ¶ 70 ("CA Order").

[7] *Id*. at ¶ 71.

[8] *Id.*

[9] *See* CA Order, App. C, ¶ 41.

One aspect of this public interest analysis is the need for adequate assurances against backsliding after 271 entry. As MCI witness Joan Campion stated in her December 16, 2002 reply affidavit in this proceeding (¶ 24), the FCC has never granted Section 271 authority without an effective anti-backsliding plan in place. The FCC has previously stated that the existence of a satisfactory performance monitoring and enforcement mechanism would be probative evidence that the BOC will continue to meet its Section 271 obligations after a grant of such authority.[10]

Under the public interest analysis, the FCC is "particularly interested" in performance standards backed by self-executing enforcement mechanisms, and notes their importance to successful local exchange competition.[11] Where a BOC relies on performance monitoring and enforcement mechanisms to show that it will not backslide, the FCC will review the mechanisms to ensure that they will perform as promised, considering, *inter alia*, the following factors: potential liability that provides a meaningful and significant incentive to comply with the designated performance standards; clearly-articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance; a reasonable structure that is designed to detect and sanction poor performance when it occurs; a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal; and

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[10] Federal Communications Commission Memorandum Opinion and Order, *In re Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, CC Docket No. 01-138 (rel. Sept. 19, 2001) ("PA Order") at ¶ 127.

[11] *In re Second Section 271 Application of Bell South Corporation et al. for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121 (Aug. 19, 1998) ("La. II Order") at ¶ 364.

reasonable assurances that the reported data is accurate.[12] Mr. Ehr acknowledges these standards and the need for this Commission to consider them. (Ehr Aff. at ¶¶ 298-99). Joint CLECs addressed many of these issues in their April 2003 filings on performance measures and OSS testing, but the Commission must now evaluate whether the anti-backsliding aspects of SBC's "compromise remedy plan" actually provide any reasonable assurances against backsliding, as the public interest analysis requires.

III. The Toothless "Compromise Remedy Plan" Is Inferior to the PSCW-Ordered Remedy Plan and Cannot Provide Anti-Backsliding Assurances

A. SBC's Proposed Wisconsin "Compromise Remedy Plan" Is Fundamentally Flawed and Will Not Achieve Its Professed Goals

1. The Remedies Due Under The "Compromise Remedy Plan" Will Not Prevent Backsliding

SBC witness Mr. Ehr boldly asserts that "SBC Wisconsin's performance assurance plan … helps show that it will continue to meet its section 271 obligations after section 271 approval is granted." (*See* February 14, 2003 Ehr Affidavit ("Ehr Aff.") at ¶ 252). First of all, this statement assumes that SBC is currently meeting its Section 271 requirements, a position with which Joint CLECs vigorously disagree. In an implicit acknowledgement of the weakness of his proposal, Mr. Ehr rather incredibly asserts that the "compromise" plan he proposes is largely superfluous, as "a remedy plan is not the only way to assure continued compliance with legal and contractual obligations." (Ehr Aff. at ¶ 255). Mr. Ehr continues on to claim that "[e]ven if there was no performance remedy plan, SBC Wisconsin has significant incentives to continue to satisfy its

[12] *In re Section 271 Application of Bell Atlantic New York to Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, 15 F.C.C.R. 3953 (Dec. 22, 1999), *aff'd, AT&T Corp. v. FCC*,

obligations. First and foremost, SBC Wisconsin is in the business of providing telecommunications services to all of its customers and intends to provide a good quality of service to those customers, whether they are retail or wholesale." (*Id*.).

Given SBC's very public advocacy in favor of terminating wholesale customers' access to the UNE Platform (*see, e.g.*, the Initial and Reply Affidavits of MCI's Joan Campion filed in this proceeding), seeking legislatively-mandated increases in UNE rates (as recently occurred in Illinois at SBC's behest, although later invalidated by the courts), and SBC's longstanding history of incurring massive fines for repeated willful violation of its obligations to competitors,[13] such assertions that SBC has only the best intentions towards CLECs are simply unbelievable. The Commission should not accept for a minute that SBC has anything in mind in proposing the "compromise remedy plan" other

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220 F.3d 607 (D.C. Cir. 2000) ("NY Order") at ¶¶ 434-36.

[13]On October 9, 2002, the FCC took the extraordinary step of imposing a $6 million forfeiture on SBC for unlawful, anti-competitive behavior. According to FCC Chairman Michael K. Powell, SBC:

> …went out and broke the law in five different states [Illinois, Indiana, Michigan, Ohio, and Wisconsin] by failing to provide shared transport to its competitors. Such unlawful, anti-competitive behavior is unacceptable. Instead of sharing, as the law requires, SBC withheld and litigated, forcing competitors to expend valuable time and resources to exercise their rights under the FCC's [merger approval] order.

See, In the Matter of SBC Communications, Inc. Apparent Liability for Forfeiture, File No. EB-01-1H-0030, NAL/Acct No. 200232080004, FRN 0004-3051-24, 0004-3335-71, 0005-1937-01 (FCC 02-282). Press Statement of Chairman Michael K. Powell on SBC Forfeiture Order Released Today (FCC, October 9, 2002). Though this forfeiture is the largest of its kind in FCC history, it is merely the latest in a string of FCC forfeitures and fines imposed on SBC for a laundry list of anti-competitive behavior, including such indefensible acts as submitting false affidavits and ignoring FCC collocation rules so as to limit collocation rights of CLECs. *See, e.g., In the Matter of SBC Communications, Inc. Apparent Liability for Forfeiture*, FCC No. 01-308 (rel. Oct. 16, 2001) *(*SBC witnesses provided false testimony in order to obtain Section 271 authorization); *In the matter of SBC Communications Inc. Apparent Liability for Forfeiture,* File No. EB-00-IH-0432, ORDER ON REVIEW (Adopted: May 24, 2001, Released: May 29, 2001) ("In this order, we affirm the March 15, 2001 Order of Forfeiture issued by the Enforcement Bureau … finding SBC … to have willfully and repeatedly violated certain of the conditions imposed when the Commission approved the merger application of Ameritech Corp. … and *SBC* …") (footnote omitted); *see also In the Matter of SBC Communications Inc. Apparent Liability for Forfeiture*, File No. EB-00-IH-0326a (Adopted: May 23, 2001, Released: May 24, 2001) ("In this Forfeiture Order, we find that SBC … willfully and than minimizing SBC's financial exposure for the violations all expect will continue absent meaningful incentives to perform.

Mr. Ehr admits that rather than starting with the PSCW-ordered plan as a base, SBC again began with the Texas-style remedy plan previously at issue in the 6720-TI-160 proceeding, which the Commission declined to approve in that docket. (Ehr Aff. at ¶ 266). While SBC asserts that it has modified the Texas plan to produce a "more stringent" Wisconsin "compromise" version, SBC fails to inform the Commission that Mr. Ehr's "compromise" proposal provides woefully less incentive against backsliding than the original Commission-ordered plan. This disparity is perhaps best highlighted by SBC's admission that ***the remedies calculated under SBC's "compromise" proposal are only 23.6% of those that would have arisen under the Commission-ordered remedy plan*** for a particular three-month period:[14]

Summarized Wisconsin Remedy Results October - December 2002					
State	Yearmo	Tier	WI Order	5-State Compromise	Difference
Wisconsin	200210	1	$1,108,475	$152,720	-$955,755
Wisconsin	200210	2	$571,200	$55,200	-$516,000
Wisconsin	**200210**	**1&2**	**$1,679,675**	**$207,920**	**-$1,471,755**
Wisconsin	200211	1	$797,700	$140,585	-$657,115
Wisconsin	200211	2	$468,400	$31,000	-$437,400
Wisconsin	**200211**	**1&2**	**$1,266,100**	**$171,585**	**-$1,094,515**
Wisconsin	200212	1	$752,025	$202,070	-$549,955
Wisconsin	200212	2	$394,400	$68,800	-$325,600
Wisconsin	**200212**	**1&2**	**$1,146,425**	**$270,870**	**-$875,555**

repeatedly violated section 51.321(h) of the Commission's rules, requiring incumbent local exchange carriers … promptly to post notice of premises that have run out of collocation space . . .)."

[14]Since Staff's request allowed SBC to select a three-month period of SBC's choice for comparison, this is presumably a best-case scenario provided by SBC. In other words, the gulf between the two plans is likely even wider than what is reflected here.

(*See* SBC's March 7, 2003 Response to PSCW Staff (Nick Linden) Request SBC-17).

Perhaps even more notably, the ***Tier 2 remedies to the State of Wisconsin under the "compromise" plan for the three-month period examined ($155,000) amount to a mere 10.8% of those that would have been incurred under the Commission-ordered remedy plan* ($1,434,000).** The Tier 2 payments under the Commission-ordered remedy plan were the result of the Commission-implemented "per occurrence" remedy approach. The Commission plainly intended with this methodology to create sufficient Tier 2 payments to ensure acceptable wholesale service quality without granting competitors a windfall. In so structuring its plan, the Commission reflected its value judgment about where remedies should lie given that ultimately, the harm caused by lapses in SBC's wholesale service quality is borne by Wisconsin consumers, who receive faulty service when SBC does not perform adequately. Mr. Ehr's "compromise" plan turns this goal on its head.

It should be obvious to the Commission that payments averaging out to approximately $90,000 per month will have no discernable impact on SBC Wisconsin's provision of wholesale service.[15] This amount is a mere pittance, and will constitute nothing beyond a negligible "cost of doing business" as SBC continues its all-out assault on local competition. Any claims by SBC that its "compromise" plan "provides a

[15]While the short time allotted for Joint CLECs to make this filing did not allow for in-depth analysis and computation of Joint CLECs' estimated costs resulting from poor SBC wholesale performance in this state, as a point of comparison, CIMCO Communications, Inc., a small CLEC in Illinois, estimated that its costs as a result of poor wholesale service from SBC were approximately $112,400 per month for salaries and benefits of personnel who must resubmit orders, follow up with SBC on orders, track and report problems internally and to SBC, and communicate with CIMCO customers regarding resolution; another $10,000 a month in refunds to customers, and $5,000 per month in lost revenue and margin opportunities. CIMCO further estimated that it had lost customers as a result of poor SBC wholesale service to the tune of approximately $36,000 per month. In context of these figures for a single small CLEC, the $90,000 average monthly remedy payment made under the SBC "compromise" proposal is plainly insufficient to preclude backsliding.

meaningful incentive for SBC Wisconsin to provide wholesale service to its competitors" (*see* Ehr Aff. at ¶ 302) are therefore not credible. Indeed, multi-million FCC fines have done little to correct SBC's brazenly anticompetitive conduct, and there is absolutely no reason to conclude that remedy payments this small will have the power to prevent backsliding. Instead, blessing the proposed "compromise" plan will simply confirm for SBC that it will be allowed to continue to violate its obligations to competitors with virtual impunity.

2. The "Compromise Remedy Plan" Does Not Satisfy the Commission's Objectives for a Remedy Plan

Beyond its inability to generate any behavior-impacting remedy payments, SBC's "compromise" plan deviates from the Commission's plan in numerous respects. Each of these deviations significantly dilutes the strength of the plan. Indeed, this Commission has already reviewed each of these offending provisions and specifically excluded them from the Commission's own plan as inconsistent with the public interest.

<u>Indexing Is Complicated, Arbitrary, Discriminatory, and Provides Far Too Much Reduction In Remedies.</u>

First and foremost, SBC's "compromise" plan eliminates the Commission's standard per-occurrence payment, and instead provides a litany of potential reductions of remedy payments. The SBC plan is now even more complex and ripe with remedy reductions than the Texas plan that the Commission initially rejected. When rejecting the SBC Texas plan, the Commission made clear that it intended to have a plan that was simple ("Simplicity is important in order to make the requirements that need to be made clear and make the ramifications readily known if the requirements are not met.").[16] The Commission explained that its modifications to the SBC Texas plan were intended to "increase the amount and certainty of remedy payment once discrimination has been detected."[17] Therefore, the Commission eliminated forgiveness factors (such as the infamous K table exclusion on remedies) and eliminated all grace periods. ("There shall not be a forgiveness factor.")[18] The Commission also ensured that if SBC failed a measure, it would pay the per-occurrence remedy on all transactions affected by that measure. Because of the increased assurance of remedies, the Commission adopted the payment level identified as "low" in the SBC plan. ("The lower level of payment is selected in light of the increased number of occurrences to which the remedy payment is applicable.")[19]

SBC's "compromise" plan deviates from all of these key Commission holdings. While it keeps this "low" level of remedy payments, SBC has re-inserted a host of reductions and exclusions to the per-occurrence payments. SBC's new "compromise" plan ignores the Commission's endorsement of simplicity, and instead adopts a new convoluted payment system. Instead of the K table, the "compromise" plan inserts an "Index" to limit remedy payments – both to individual CLECs and the State of Wisconsin – according to SBC's *overall* performance.[20] Thus, there is no longer a simple and predictable CLEC-specific, per-occurrence payment, which the Commission favored. In

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[16] OSS Order, pp. 26-27.

[17] OSS Order, p. 26

[18] OSS Order, p. 27.

[19] OSS Order, p. 28.

[20] *See, e.g.*, Compromise Plan, pp. 14-16, Tables 1-3.

essence, this Index decelerates remedies in a manner similar to the old Texas Plan K-table exclusion rejected by the Commission. This Indexing system clearly violates the simplicity and "certainty of remedy payment once discrimination has been detected" that the Commission found the public interest to require.

To illustrate the problem of using aggregate CLEC results to calculate the level of remedies to be paid, assume hypothetically that there are 250 performance measures at issue. Assume further that due to the specific focus of an individual CLEC's business, only 50 of these 250 measures are relevant to the particular CLEC. Under the SBC "compromise" plan, SBC could selectively fail these 50 measures and still only pay the CLEC the lowest level of remedies because the payment is based on overall, statewide, aggregate results. In other words, SBC could selectively target individual competitors for discrimination by failing the measures most key to those competitors' business, and still make minimal payments under the statewide, aggregated measurement of its performance. Conversely, under the remedy plan endorsed by the Commission, SBC's ability to meet or exceed the parity or benchmark of each performance measure is taken into account and countered with a remedy amount. The Commission's approach thereby erases the potential for discrimination that exists under the SBC "compromise" plan. In addition, under the Commission's plan, the remedies increase based on the reliance of CLECs on the process being measured – *i.e.*, when the measure is failed, per occurrence remedies are paid for the volume of activity affected.

It is not difficult to understand why the SBC substitute plan is inherently discriminatory. The plan, in essence, provides an avenue by which to target poor performance to achieve a goal of obtaining maximum competitive advantage coupled with minimal financial repercussions. With little effort, SBC could focus its worst performance on a few measures crucial to a particular CLEC's ability to function (*e.g*., those relating to UNE-P provisioning, which, given SBC's vociferous objection to providing UNE-P, is not an unlikely scenario), thereby stifling competition, and still wind up making minimal Tier 1 or Tier 2 payments. At the very least, SBC would have little incentive to fix poor performance on the most competitive-affecting measures, so long as its overall performance remained good.

Even aside from the real possibility of such calculated conduct, should SBC's unintentional performance failure fall under only a few measures, but the failure is extremely severe within those impacted measures, competitors who are tremendously reliant upon successful performance will be disproportionately impacted by SBC's performance lapses, with little recourse and with little or no repercussion for SBC. The Commission's plan, while it did not focus on the magnitude of the performance gap, did capture the impact of an inferior process by focusing per occurrence and per measure remedies on the volume of CLEC activity harmed by that process.

The SBC substitute plan thus not only fails the public interest standard as applied by the Commission in the OSS Order, it also fails the nondiscrimination standard set forth in 47 U.S.C. § 252(e)(2)(A)(i). The Commission should therefore reject the SBC proposal as an inadequate anti-backsliding enforcement plan for 271 purposes.

Furthermore, this new Index approach also has the following infirmities:

- The amounts and Index Value ("IV") breakpoints in Tables 1 and 2 for Tier I are completely arbitrary. They were agreed upon in limited negotiations between SBC and two selected CLECs, neither of which is advocating the adoption of that plan here. These tables have no basis in any factual analysis, and only exist to limit remedy payments.

- The purpose of these tables (to reduce remedy payments) is clear when one compares the remedy payment amounts to those of the Commission plan, especially for Tier 2 payments to the State of Wisconsin. *See* discussion in Section III.A.1, above.

- The combination of unmerited reductions of amounts, and further reduction by IV, even further reductions by year of plan, and decimation of Tier 2 payments to the State from the Commission Plan is clearly intended to transform the Remedy Plan into a simple cost of doing business, and thus encourage, not prevent, SBC to offer poor wholesale service to CLECs as a means to harm competition.

- The IV structure produces numerous anomalies in the SBC proposed plan operation. For example, a very small improvement in overall performance, even when service remains at very low levels, can cause a reduction in the per occurrence or per measure/cap amounts for a chronically failing submeasure. Appropriate performance for this submeasure may be critical to a particular CLEC's business plan. For example, in Table 1, consider SBC "improving" after six months of poor service from an IV of overall performance of 73% to one of 74%. This is not a substantial improvement, and would be of a major concern. Yet, in this circumstance, the payment would *be reduced* from $900 to $800.

- The Commission Plan reduces remedies to zero when the percentage of passing submeasures goes to 100%. The SBC proposal reduces remedies much faster as the overall percentage of passing submeasures improves toward 100%. This structure is reminiscent of the infamous K-table exclusion of the Texas plan which, as discussed earlier, has already been rejected by the Commission. That K-table also caused the remedies to reduce much more quickly as the number of failed measures decreased than under the remedy payment structure that the Commission found the public interest to require. Therefore, the IV structure is nothing more than a method to subvert the Commission's direction and reinsert a new, clandestine form of the K-table.

- Section 8.4's discussion of the IV mechanism as contained in Tables 1 and 2 is in fact inconsistent with the tables themselves. The second and third sections of each table seem to indicate that the amounts are automatically further reduced in each subsequent 12-month period. Section 8.4 has a much more complex description of this reduction that yet again hinges on SBC's overall performance. Furthermore, there is no explanation or derivation of how SBC arrived at the critical 92% overall performance

> level that is key to this provision for even further remedy reduction in the second and third sections of each table.[21]

In sum, the Indexing contained in the "compromise" plan makes it impossible for the plan to meet the FCC criteria for a 271 remedy plan. The third bullet point of the FCC's requirements is the weakest link for the SBC "compromise" plan. It does not detect and sanction poor performance when it occurs. It only raises remedies based on statewide, aggregated results for all performance measures for which there was activity, rather than on a CLEC-by-CLEC basis, where the magnitude by which SBC fails to comply with any particular performance measure is taken into account when determining remedy payments. The Commission-ordered remedy plan, however, does account for the harm to the individual CLEC and the magnitude of SBC's failure in terms of higher remedies for each occurrence of activity affected by the inferior process. As the Commission has already found, the Commission's plan is required in the public interest. It should be the plan endorsed for 271 purposes.

<u>The "Compromise" Plan is Voluntary and Within SBC's Sole Control.</u>

In addition to the criticisms concerning the Index, it comes as no surprise that the "compromise" plan is a voluntary plan, meaning that CLECs must accept its terms, without deviation via an interconnection agreement amendment. In its order approving its own plan, the Commission rejected this very approach:

> The Commission Remedy Plan shall be made immediately available through the issuance of this order. Ameritech proposed that the remedy plan be made available through amendments to interconnection agreements. This Remedy

[21] This 92% critical value is in addition to the 92% "IV." As each IV changes *each month* as one moves up and down *within each section* of the tables. Provision 8.4 causes one to move *between the sections* of the tables *each 12 months*.

> Plan is the Commission's Remedy Plan and is made available through the Commission. This Remedy Plan is not contingent upon any other term in an interconnection agreement.[22]

Certainly, a remedy plan adopted by two CLECs cannot be said to provide any significant incentive against backsliding. While SBC has indicated its agreement to tariff the terms of this plan, it is unclear how CLECs could avail themselves of such a tariff.

Moreover, SBC's "compromise" plan strips the Commission of ultimate control over changes to the plan. As this Commission has already held, "[c]hanges to the Remedy Plan shall be made by the Commission."[23] The "compromise" plan, unlike the Commission plan, is "voluntary," with all changes requiring SBC's "consent."[24] This is a key component of SBC's proposal. With this provision, SBC can literally blackball any changes it does not like, whether made by the CLECs or, more importantly, by the Commission itself. In other states where the plans are "voluntary," SBC literally uses this provision to prevent any changes to the plan to which it does not consent from ever going into effect. For example, the Public Utility Commission of Texas ("Texas PUC") made a number of improvements to that state's remedy plan. The plan used in Texas is a "voluntary" plan. SBC's Texas affiliate, Southwestern Bell Telephone Company ("SWBT"), sought rehearing of the Texas PUC's decision, stating:

> With respect to the performance remedy plan matters for which SWBT seeks reconsideration, this pleading serves as notice, pursuant to § 6.4 in Attachment 17 of the Texas 271

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[22] OSS Order, p. 29.

[23] OSS Order, p. 29.

[24] *See, e.g.,* §6.4 of the "Compromise" Plan, where SBC requires that any changes to the plan are by "mutual agreement of the parties." This means that SBC can veto any changes to which it does not "agree." In contrast, in the OSS Order the Commission has amended this provision to require all changes subject to its approval.

> Interconnection Agreement (T2A),[25] that SWBT does not agree to those changes to the performance remedy plan. To the extent that the Commission does not reconsider the performance remedy plan modifications addressed in this motion, SWBT will weigh its options with regards to its rights under § 6.4 and will proceed accordingly.[26]

This is the future envisioned by SBC if its "voluntary" plan is adopted: SBC will literally be the "keeper" in charge of the remedy plan and any changes to it; relegating the Commission to the role of being powerless to do anything absent SBC's "agreement." Certainly it is not in the public interest for this Commission to bless "the fox guarding the henhouse."

The FCC also has indicated that it is a state's continuing oversight and fine-tuning of wholesale performance assurance plans that cinch the deal for 271 approvals, rather than a specific type of plan being submitted. In approving BellSouth Corp.'s 271 applications for Florida and Tennessee, the FCC said:

> In addition, we note that both the Florida Commission and the Tennessee Authority have the ability to modify BellSouth's SEEMs [Self-Effectuating Enforcement Mechanisms]. We anticipate that the parties will continue to build on their own work and the work of other states to ensure that such measures and remedies accurately reflect actual commercial performance in the local marketplace.[27]

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[25] Section 6.4 of Appendix 17 to the T2A states in pertinent part: "Any changes to the existing performance measures and this remedy plan shall be by mutual agreement of the parties . . . ."

[26] *See,* Southwestern Bell Telephone Company, L.P. D/B/A Southwestern Bell Telephone Company Motion for Reconsideration and Clarification of Order No. 45, p. 3, Texas PUC Project No. 20400 (November 1, 2002).

[27] Order, *Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Authorization To Provide In-Region, InterLATA Services in Florida and Tennessee*, WC Docket No. 02 – 307, issued December 19, 2002, Page 92, ¶ 170.

Many of the FCC's 271 approvals emphasize the same theme of active state and open CLEC involvement in designing an effective remedy plan, and an expectation that the state regulators would continue to monitor the plans of differing "strengths and weaknesses" that have accompanied 271 applications:

> Like the New York Commission, whose section 271 verification we also accorded substantial weight, the Texas Commission directed a lengthy, rigorous and open collaborative process with active participation by Commission staff and competitive LECs. The Texas Commission also developed a comprehensive performance measurement and remedy plan, which it continues to monitor and refine.[28]

Clearly, due to the "voluntary" nature of the so-called SBC "compromise" plan, if the Commission found it inadequate and in need of fine-tuning, the Commission could only make changes to the plan with SBC's approval. Otherwise, the Commission would face the same legal challenge of its authority it faces now from SBC.

<u>The Compromise Plan Dilutes The Strength of Both the Annual and Mini-Audits.</u>

The audit provisions of the "compromise" plan also violate the Commission's determination of what the public interest requires. The Commission specifically modified the audit provisions of the Texas plan to provide for an "independent annual audit" of the accuracy of SBC Wisconsin's performance measurement data "with the cost of the audit to be paid by Ameritech."[29] The Commission also provided that CLECs could request a mini-audit, and that during any audit the CLECs shall be provided access

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[28] *In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company and Southwestern Bell Communications Services, Inc. Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas*, Order, CC Docket No. 00-65, issued June 30, 2000, at paragraph 11.

[29] OSS Order, p. 29.

to raw data. SBC's "compromise" plan, in contrast, provides that the CLECs can only request an audit in the event of a dispute and further provides, in violation of this Commission's order, that the audit is to be conducted "at the CLEC's expense."[30] The "compromise" plan also does not ensure CLECs access to raw data. The SBC plan does provide for a periodic audit, but it indefinitely extends the terms between audits and makes them regional as opposed to Wisconsin-specific. In all, SBC's plan significantly dilutes the strength and purpose of the audit provisions.

<u>The "Compromise" Plan Does Not Provide For Automatic Payments Via Check.</u>

SBC's "compromise" plan also ignores the Commission's direction concerning the manner in which remedy payments are made. In reviewing the SBC Texas plan, the Commission rejected SBC's position that payments be made via bill credit. The Commission instead directed that "[r]emedy payments shall be made via separate check," reasoning that "[b]ill credits for remedy payments as proposed by Ameritech could create liquidity issues for CLECs."[31] Section 5.6 of SBC's "compromise" plan requires that CLECs take active steps to receive remedies in cash rather than credit. This is directly contrary to the simple and clear direction provided by the Commission's plan.

<u>The "Compromise" Plan Limits CLECs' Other Remedies.</u>

Section 6.1 of the "compromise" plan contradicts the Commission's finding that the remedy plan "shall not affect any civil or contract remedies or rights of the CLECs."[32] While the first sentence of that section purports to implement this finding, the entirety of

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[30] Compromise Plan, Section 6.5

[31] OSS Order, p. 30.

[32] OSS Order, p. 29.

Section 6.1 contradicts this sentence by referring to the remedies as "liquidated damages." By definition, liquidated damages are foreclosing in nature.

The "Compromise" Plan is Not Self-Executing.

Section 7.2 of the "compromise" plan violates the Commission's holding that SBC "shall be required to first prove to the Commission that there has been bad faith on the part of a CLEC or other reasonable cause before Ameritech can withhold any remedy payments." Section 7.2, to the contrary, confers upon SBC the unfettered discretion to unilaterally withhold remedy payments if it decides the CLEC is unreasonably holding or dumping orders. As the Commission explained, the provision "in Ameritech's plan that would allow it to withhold payments essentially eviscerates the self-executing mechanism in the plan."[33]

Similarly, Section 7.3 of the "compromise" plan needlessly complicates and limits the self-effectuating nature of the plan. It allows SBC to unreasonably withhold remedy payments indefinitely, even if the Commission finds against it in dispute resolution. Like so many other of SBC's commitments, such payment would only be made subject to appeal. This is because SBC proposes to pay remedy amounts due "within 30 days of a final, non-appealable resolution" of the dispute. Given SBC's litigious nature, this provision is a green light for SBC to concoct needless disputes to avoid paying remedies.

Section 7.6 seeks to insert yet another cap into the plan. Specifically, this section provides that SBC's remedy payments to any given CLEC will be capped at the amount billed to the CLEC for a given month. SBC could, therefore, target CLECs with bad performance at crucial times (*e.g.*, during initial entry or promotions), secure in the

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[33] OSS Order, p. 29.

knowledge that the CLECs remedy for such poor performance will be capped at one month's billing.

<u>The "Compromise" Plan Includes Inappropriate "Ceilings" On Performance.</u>

Section 8.5 of the "compromise" plan appears to be a wildly contorted version of the CLEC proposal for parity with a floor. Section 8.5 includes not only a floor on performance, but also a ceiling. Having a ceiling on liability invites SBC to subtly offer worse service to CLECs than to itself or its affiliates, subverting the whole reason for parity measures in the first place. In addition, adding this element to the plan injects yet another layer of complexity to the plan for no good reason. Moreover, this Commission has rejected the notion of parity with a floor.[34]

<u>Miscellaneous Criticisms</u>

The proof of compliance concept contained in Sections 8.6 and 8.7 is problematic (and inconsistent with the Commission plan) because it does not kick-in until the third month of non-compliance, and it flattens out after the sixth month of non-compliance. There are also very rapid step-downs at unwarranted times.

Sections 8.8, 8.9 and 8.10 exist because of SBC's penchant for restating performance results due to its poor OSS. Obviously, such a provision should not be allowed, and would only encourage SBC to continuously restate results with no meaningful incentive to perform. Rather than drafting such an exclusion, it would be better for SBC to fix its systems to ensure accurate results.

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[34] OSS Order, p. 22.

In conclusion, SBC's "compromise" plan is at odds with numerous key provisions of the Commission's plan. The Commission should not be bullied into acquiescing to a plan that it has already concluded does not serve the public interest. There is far too much at stake here. The Commission should require as a pre-condition to any positive 271 recommendation that SBC Wisconsin agree to abide by the terms of the Commission-approved plan.

The Commission need not worry about its authority to impose such conditions on any positive 271 recommendation. The Commission can take the approach the Colorado Public Utilities Commission did in its 271 proceeding, which was conducted by a Special Master, an expert independent economist, hired by the PUC to develop a remedy plan for the 271 proceeding. The Special Master determined, and the Colorado PUC agreed that:

> This Order is not compulsory, but rather hortatory. If Qwest implements the CPAP [Colorado PAP] by adopting the attached recommended SGAT [Statement of Generally Accepted Terms] language -- and assuming all other conditions have been met -- I will recommend to this Commission that it recommend to the FCC that Qwest's entry into the long distance market is consistent with the public interest requirement of 42 U.S.C. § 271(d)(2)(B). On the other hand, if Qwest declines to adopt this version of the CPAP, I will advise this Commission to withhold a recommendation of § 271 compliance.[35]

The Pennsylvania Commission took a similar approach when opining on Verizon's 271 application. To ensure that Verizon would not replace a state-ordered, self-effectuating remedy plan decisions with a "voluntary" plan with remedies that merely amount to a cost of doing business after 271 approval, the Pennsylvania Public

[35] *In the Matter of the Investigation into Alternative Approaches for a Qwest Corporation Performance Assurance Plan in Colorado*, Colorado PUC Order, Decision No. R01-997-I in Docket No. 01I-041T, issued September 26, 2001, Paragraph 13, Page 14. Qwest agreed to file a SGAT including the remedy plan language developed by the Special Master and ordered by the PUC.

Utility Commission did, as Joint CLECs propose here, condition its 271 approval on several matters, including Verizon's withdrawal of legal challenges to the PUC's authority to impose such a remedy plan:

> In our judgment, Verizon needs to take further action in the following critical areas in order to demonstrate to the Commission's satisfaction that the local exchange and exchange access markets in Pennsylvania are fully and irreversibly open to competition in accordance with the requirements of Section 271(c)(2)(B). We find that the Pennsylvania markets will not be fully open to competition absent the following:
>
> Performance Assurance Plan: A permanent Performance Assurance Plan ("PAP"), together with self-executing remedies, appropriate penalty levels, performance standards, and other features, is essential to properly incent Verizon to provide and to continue to provide adequate and non-discriminatory service to CLECs after Section 271 approval is achieved. Moreover, absent withdrawal of Verizon's pending appeal challenging the Commission's legal authority to impose remedies, no PAP can be considered adequate and permanent so as to prevent backsliding. Therefore, to implement a PAP that is adequate for Section 271 purposes, Verizon must agree to augment the current PAP as follows:
>
> (1) withdraw the current appeal regarding alleged lack of statutory authority to impose remedies;
>
> (2) effective for performance beginning July 1, 2001, the Tier II remedies payments for metrics that are missed beyond ninety (90) days shall be set at the amount of $25,000 and shall be self-executing and applicable to all metrics; and,
>
> (3) in the further proceeding called for in ordering paragraph 16 of our *Functional/Structural Separations Order,* there will be a rebuttable presumption that the features of the NY remedies plan should be made applicable and tailored to Pennsylvania. In the interim, the present Pennsylvania metrics and PAP will continue to apply.[36]

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[36] *See* Pennsylvania Public Utility Commission's June 6, 2001, consultative letter in Docket No. M-00001435 from its Secretary James J. McNulty to Verizon Vice President and Counsel Julie A. Conover at pages 3-4. Verizon sent a letter on June 7, 2001, agreeing to withdraw the appeal.

Joint CLECs agree with the Pennsylvania PUC that absent withdrawal of pending court challenges of the state commission's legal authority to impose remedies, "no PAP can be considered adequate and permanent so as to prevent backsliding." As demonstrated above, larger amounts are needed to motivate SBC to fix multiple problem areas causing inefficiencies that burden CLECs, and discrimination that hinders them in trying to compete in the local market. In fact, one might suggest that the remedies to motivate SBC to treat its competitors fairly may need to have even more of a bite than those focused on improving treatment of its own customers so they do not move to competitors' services. The Commission-ordered plan is the only one that has adequate remedies to motivate performance improvements.

B. This Commission Has Already Declined to Find SBC's Proposed "Compromise Remedy Plan" Adequate for Section 271 Purposes

SBC is correct that Joint CLECs have previously filed comments in opposition to SBC's "compromise remedy plan" in the context of dockets opened to consider applications from TDS Metrocom and Time Warner Telecom to amend their respective interconnection agreements to incorporate the plan. While SBC characterizes these Joint CLEC comments as "substantial," in reality, Joint CLECs had seven calendar days from their receipt of the notice for comment to put together a submission that was limited to ten pages by Commission order. Furthermore, the context of these comments was not consideration of the "compromise remedy plan" as a Section 271 anti-backsliding plan, but instead an analysis of whether the adoption of the amendments was consistent with 47 U.S.C. § 252.

That said, the criticisms raised by Joint CLECs in PSCW Dockets 05-TI-712 and 05-TI-714 are applicable here and deserve summary. As Joint CLECs explained in their filings in those proceedings, Joint CLECs were fearful that SBC would seek to use specific terms of the "compromise remedy plan" as ammunition against CLECs in the 271 Docket, as well as in subsequent interconnection agreement negotiations and arbitrations. Obviously, these fears have been realized.

Joint CLECs addressed their two greatest concerns with the "compromise" plan in their interconnection comments, cautioning that the absence of comment on other issues generated by the proposed amendments was not intended to suggest, and should not be construed as, the Joint CLECs' endorsement of the remaining provisions of the proposed plan, but was rather a result of page limitations. As Joint CLECs explained, under 47 U.S.C. § 252(e)(2)(A)(i), a state commission may reject a negotiated interconnection agreement if the "agreement (or a portion thereof) discriminates against a telecommunications carrier not a party to the agreement." Joint CLECs argued that the "compromise" plan was discriminatory to other CLECs because it paved the way for inadvertent discrimination and targeted anticompetitive conduct. As Joint CLECs stated: "First, and foremost, the most discriminatory aspect of the Proposed Amendment is Ameritech's apparent hope to force CLECs to take this plan, without hearing, as their Wisconsin remedy plan. That is, WorldCom and AT&T certainly were not parties to the negotiation of this plan. The plan was the subject of unilateral meetings between TDS and Ameritech, without input from any other CLEC, or more significantly, the input of the Commission." While SBC protested at the time that it would attempt no such thing, a review of the Ehr affidavit reveals that this is exactly what SBC has since done.

As also explained in more detail above, the Joint CLECs noted that the "compromise" plan's "Appendix: PERFORMANCE REMEDY PLAN – WISCONSIN" reflected the measurement of SBC's performance based on statewide, aggregated results for all performance measures for which there was activity, rather than on a CLEC-by-CLEC basis, where the magnitude by which SBC failed to comply with any particular performance measure is taken into account when determining remedy payments.[37] The latter is the case with the Commission-ordered remedy plan, which *did* account for the harm to the individual CLEC and the magnitude of Ameritech's failure in terms of the volume of activity served by the substandard process.

Joint CLECs also noted, as described more fully above, that remedies under the "compromise remedy plan" did not increase with the magnitude of the performance miss, but only with the percentage of remedies missed. Joint CLECs further observed, as also described fully above, that it was not difficult to understand why the "compromise" plan was inherently discriminatory. The plan, in essence, provided an avenue by which to target poor performance to achieve a goal of obtaining maximum competitive advantage coupled with minimal financial repercussions. The Joint CLECs therefore stated that the "compromise" plan failed the nondiscrimination standard set forth in 47 U.S.C. § 252(e)(2)(A)(i).

In a discussion even more relevant to this proceeding, Joint CLECs further observed that under 47 U.S.C. § 252(e)(2)(A)(ii), a state commission may reject a negotiated interconnection agreement if the "implementation of such agreement or portion [thereof] is not consistent with the public interest, convenience, and necessity."

[37] *See, e.g*., Appendix at 1.0.

Joint CLECs explained that the "compromise" plan was not consistent with the public interest, and that this failing provided an independent basis for Commission rejection of the TDS and Time Warner Telecom remedy plan interconnection amendments.

Joint CLECs pointed out that the "compromise" plan purported to preclude CLECs adopting it from seeking to opt into any new remedy plan that may subsequently become available for four years from its effective date:

> This Amendment shall not modify or extend the Effective Date or Term of the underlying Agreement, but rather, shall be coterminous with the underlying Agreement. Notwithstanding, the parties intend that the PERFORMANCE REMEDY PLAN will be included in any successor agreements for a total term of four years from the effective date of this agreement.[38]

Any CLEC who elected to opt into the "compromise" plan pursuant to 252(i) of the Telecommunications Act of 1996 would presumably have to accept this same term. Joint CLECs informed the Commission that representations made by SBC's counsel at the September 6, 2002 walk-through of the plan for the benefit of the parties to the Wisconsin 271 docket revealed that SBC's position is that the cited language precludes the CLEC from seeking to be governed by any subsequent Commission-ordered remedy plan, or to opt into another competitor's negotiated or arbitrated remedy plan, during the four-year term of the Proposed Amendment. In short, any CLEC that adopted the "compromise" plan would be "stuck" for the next four years, regardless of whether the Commission ordered a more pro-competitive plan, or the Commission plan was restored on appeal. SBC would also contend that any CLEC that had agreed to the "compromise" plan could not later opt into a more preferable one negotiated or arbitrated by another

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[38] *See* Proposed Amendment at (2).

CLEC as part of an interconnection agreement, in clear violation of the opt-in rights set forth in 47 U.S.C. § 252(i). Joint CLECs noted that such attempts to stifle competition by limiting CLECs' access to interconnection terms to which they are legally entitled are contrary to the public interest, as they violate the law and hinder the development of competition (a goal of both the Federal and Wisconsin Telecommunications Acts).[39]

The Commission took these criticisms to heart, and addressed them in its orders approving the TDS and Time Warner interconnection agreement amendments:

> The Commission construes the Agreement between AW [Ameritech Wisconsin] and TDS Metrocom as based solely on the needs and interests of those parties. Any other CLEC may negotiate with Ameritech for a different or better remedy plan, subject to § 252 arbitration in the event of impasse. This Commission order does not constitute a Commission adoption of any substantive term or provision of the Agreement as a policy of the Commission applicable generally to other telecommunications providers or specifically to providers seeking interconnection with AW. Furthermore, nothing herein should be construed to mean that the Commission finds the Agreement sufficient for 47 U.S.C. § 271 approval purposes. That decision will be made by the Commission in docket 6720-TI-170 at the appropriate time. Moreover, approval of the Agreement does not in any way waive the Commission's right to pursue appeals of court decisions on the remedy plan ordered in docket 6720-TI-160, or to order a different statewide remedy plan. Should the Commission prevail in court or order a different statewide remedy plan, approval of the Agreement does not preclude TDS Metrocom from exercising the change in law provisions of its interconnection agreement to pursue presumably better terms and conditions.[40]

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[39] Joint CLECs also noted for the Commission an array of additional flaws of the "compromise" plan, many of which were described above.

[40] *See* "Order Approving Interconnection Agreement," PSCW Docket No. 05-TI-712, *Application for the Approval of the First Amendment to the Interconnection Agreement Between TDS Metrocom, LLC, and Wisconsin Bell, Inc. (d/b/a Ameritech Wisconsin)* (January 6, 2003), at 2-3. The January 9, 2003 "Order Approving Interconnection Agreement" in PSCW Docket No. 05-TI-714, *Application for the Approval of the First Amendment to the Interconnection Agreement Between Time Warner Telecom of Wisconsin, LP, and Wisconsin Bell, Inc. (d/b/a Ameritech Wisconsin)*, contained parallel language at 2-3.

There is no reason for the Commission to reverse course now, and suddenly deem the feeble "compromise" plan to be acceptable for Section 271 purposes.

C. The "Compromise Remedy Plan" Sponsored by Mr. Ehr in Wisconsin Is Not Substantively the Same as the Remedy Plans Ultimately Approved in Michigan or Illinois And Supporting SBC's 271 Bids In Those States

In SBC's June 19th letter opposing the Joint CLECs' requested three-day enlargement of time in which to file these comments, SBC asserted that the Joint CLECs' work was practically done because AT&T and MCI recently filed comments on a substantively identical compromise remedy plan offered by SBC in Illinois.[41] While the "compromise" plan offered by Mr. Ehr here shares many of the same fatal defects as the plan that SBC proposed in the Illinois 271 proceeding, the "compromise" plan tendered here is not substantively the same as the one ultimately *approved* in Illinois. Nor is it substantively the same as that approved by the Michigan Commission, which is a state-specific plan approved by the Commission.

In fact, during the Illinois 271 review – where the ICC granted the parties several rounds of comments on the SBC "compromise" plan – SBC consented to some of the party-proposed changes to its plan. In addition, in its 271 order, the ICC ordered further modification to the SBC plan, and SBC agreed to implement each of these modifications apparently absent even the usual SBC appeal.[42] The ICC modifications include: (1) rejection of all provisions providing for "floors and ceilings" on performance, (2) modification of the annual audit provisions to ensure more timely audits of SBC's performance measures, (3) modification of the mini-audits to be consistent with the previously-approved Illinois remedy plan, (4) modification of the opt-in provisions to

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[41] *See* June 19, 2003 letter from Jordan Hemaidan to Administrative Law Judge Whitcomb, PSCW Docket No. 6720-TI-170, at 2.

[42] ICC Docket No. 01-0662, Order On Investigation (May 13, 2003) ("Illinois 271 Order").

allow CLECs an easy manner to opt-into the compromise plan within 20 days of its availability, absent the need to negotiate and sign an amendment, (5) elimination of Section 7.l of the "compromise" plan and its myriad of exclusions, (6) adoption of the Commission-approved version of Section 5.5 dealing with Tier 2 remedies, and (7) elimination of the term of the "compromise" plan in favor of an open-ended term.[43]

Similarly, the Michigan commission, prior to and subsequent to its positive recommendation on SBC Michigan's 271 application, adopted and recently strengthened its own state-specific remedy plan. That plan, which SBC now relies upon for 271 approval, is significantly different than the SBC "compromise" plan here.

In Case No. U-11830, the Michigan Public Service Commission ("MPSC") adopted a remedy plan applying to Ameritech. The MPSC made the following changes to the Texas Remedy Plan:

1) granted the CLEC request to replace the absolute limit on remedy payments for per month and per CLEC limits to a procedural cap. If the cap is reached, the affected CLECs can file with the MPSC to get additional remedies;

2) eliminated the infamous k table exclusion on remedies

3) committed to seriously consider requests made after three months to multiply remedy amounts if SBC offers poor wholesale service while only paying nominal remedies;

4) required SBC to compare its data to affiliate data and pay remedies if its affiliate is treated better than non affiliate CLECs, where there are more than 30 transactions in a month;

5) rejected SBC's proposal forcing CLECs to prioritize remedies, with all performance measurements having "medium" priority;

6) ruled that the cap on remedies (36% of revenues) is not absolute, as SBC wanted, but is "procedural";

[43] Illinois 271 Order, ¶¶ 3499, 3514, 3517, 3518-21, 3522-23, 3531-32.

7) rejected SBC's proposal to lower remedies by having statistical testing on benchmarks; and

8) rejected the Texas Plan's other exclusions on liability, except for CLEC "acts or omissions" and the "k-table" exclusion on remedy payments.[44]

The CLECs stress that they do not believe the above-noted modifications, standing alone, make the SBC Illinois "compromise" plan or the SBC Michigan plan 271 compliant, much less compliant with this Commission's determination in the OSS Order of what the public interest requires. However, the Michigan and Illinois experiences, coupled with the precedent set in Colorado and Pennsylvania, demonstrate that this Commission need not rubber stamp SBC's proposed remedy plan. The Commission should uphold its past decisions and condition any positive 271 recommendation on SBC's adoption of the Commission's state-specific remedy plan that will benefit the public interest, not the sole interest of SBC.

D. The Indiana Commission Has Explicitly Rejected the SBC "Compromise Remedy Plan" as a 271-Compliant Anti-Backsliding Plan

The Indiana Utility Regulatory Commission ("IURC") has addressed the "compromise remedy plan" lauded here by Mr. Ehr in both the interconnection amendment context, and in the 271 context, and in both instances, found it to be

[44] *See,* MPSC Case No. U-11830 Opinion and Order (July 25, 2001), and Opinion and Order (March 26, 2003). Notably, SBC has unilaterally refused to implement the MPSC's March 26, 2003 decision eliminating the k table, and still unlawfully applies this exclusion. As can be seen, the MPSC eliminated most of the egregious anti-competitive elements of the old Texas Plan. One cannot be struck by the irony that, with its *fourth* Michigan 271 application pending, SBC offers up the toothless "Compromise" plan rather than just agreeing to implement in Wisconsin the most recent version of the Michigan Plan. It is obvious that the FCC will opine first on the Michigan Plan. If SBC really cared about regional consistency, that is what the Company would do. Indeed, the CLECs would welcome SBC offering in Wisconsin the

substandard in terms of the public interest. In approving a Time Warner Telecom interconnection amendment identical to the one this Commission considered, the IURC held as follows in Cause No. 40572-INB-162:

> Although we find that the proposed Amendment should be approved, as detailed below, there are some concerns to be addressed regarding the issues raised by the commenting CLECs. At the time of the CLEC filing in this Cause, Ameritech Indiana's petition for reconsideration and motion for a stay were pending. Ameritech did request the Commission to vacate the remedy plan order and choose either the Texas plan, which had already been rejected by the Commission, or the Time Warner/Ameritech proposed amendment. The Commission declined Ameritech's offers. It appears that Ameritech was attempting to persuade this Commission to impose a privately negotiated amendment on all CLECs. Notwithstanding Ameritech's assurances to the contrary, we are concerned that Ameritech may seek to impose the terms of this Time Warner amendment on its competitors in subsequent proceedings. However, we emphasize our statement in the December 19, 2002, Order on Stay and Reconsideration in Cause No. 41657 that Section 252(i) and 47 CFR 53.809 do not compel a CLEC to adopt pre-existing agreements.
>
> *Therefore, we specifically find that approval of the proposed Amendment in this Cause should have no precedential effect in Cause No. 41657. That is, Ameritech Indiana cannot take the position that our approval of this Amendment is acquiescence that a remedy plan is in place in Indiana for purposes of meeting its Section 271 obligations. In fact, we specifically find that the remedy plan as agreed to by Time Warner is inadequate to meet our guidelines or address our concerns set forth in that Cause.*[45]

In so ruling, the IURC cemented findings that it had made earlier in the Indiana 271 docket:

> Ameritech Indiana asserts that, if the Commission reconsiders and vacates its October 16 Order and adopts, instead, either the

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most recent version of the Michigan Plan (as modified in the MPSC's March 26, 2003 Opinion and Order) subject to the pending appeals of the Wisconsin plan.

[45]*See* Order, *Submission of Indiana Bell Telephone Company, Inc. d/b/a Ameritech Indiana for Commission Recognition of an Amendment to an Interconnection Agreement Arrived At Through Voluntary Negotiations with Time Warner Telecom of Indiana, L.P.*, IURC Cause No. 40572-INB-162 (January 15, 2003) at 3 (emphasis added).

> Original Ameritech Plan or the Ameritech Compromise Plan, it will "eliminat[e] additional delay and expense for all concerned – and also yiel[d] a remedy plan that will further the objectives the Commission ***intended*** to advance" [emphasis added]. We find this statement disingenuous in that *if we were to adopt all of Ameritech's arguments, our stated objectives from our performance assurance orders and docket entries could not be met*. Section 252(i) does not compel CLECs to adopt a pre-existing agreement, nor does 47 CFR 51.809. *No CLEC has indicated a desire or willingness to adopt either the Time Warner amendment (the "Ameritech Compromise Plan") or the Texas plan (the "Original Ameritech Plan") for Indiana. Indeed, of those CLECs that have made a choice between the IURC plan and the Time Warner amendment, all have chosen the IURC Plan and/or opposed the Time Warner amendment. An Agreement or Plan that only one CLEC has found acceptable cannot be construed as providing benefits to all CLECs or as supporting the overall competitive environment*.[46]

This Commission should be – as is the Indiana Commission – immensely concerned about the issue of backsliding, and the fact that the "compromise" plan proposed yet again by SBC is woefully inadequate to allay those concerns. While the IURC has not yet issued its recommendation on SBC Indiana's Section 271 application, it is unlikely to deviate from the firm position it has taken previously. This Commission should heed the IURC's cautions.

IV. SBC Continues to Experience Serious Billing Problems

Joint CLECs provide the Commission with three recent SBC Accessible Letters (attached as Group Exhibit 1 hereto) that demonstrate that contrary to the allegations in SBC's newly-refiled Michigan 271 application and in its Wisconsin pleadings, SBC continues to experience new and critical billing failures:

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[46] *See* "Order on Stay and Reconsideration," *In the Matter of the Petition of Indiana Bell Telephone Company, Incorporated d/b/a Ameritech Indiana, Pursuant to IRC. 81—2-61, for a Three-Phase Process for Commission Review of Various Submissions of Ameritech Indiana to Show Compliance with Section 271(c) of the Telecommunications Act of 1996,* IURC Cause No. 41657 (December 19, 2002) at 8 (internal footnote omitted; Italic emphasis added; bold Italic emphasis in original).

- CLECAM03-193 (issued June 2, 2003) indicates that SBC made errors in its calculation of the adjustments due as a result of the major errors associated with the CABS conversion – in other words, SBC made further billing errors in the process of attempting to rectify prior billing errors.

- CLECAM03-196 (issued June 6, 2003) indicates that SBC had been erroneously billing CLECs loop rates for various rate zones as a result of faulty rate tables, impacting the entire SBC-Midwest region, including 13 wire centers in Wisconsin.

- CLECAM03-197 (issued June 6, 2003) indicates that SBC has been erroneously billing certain residential lines as business lines, impacting CLECs who are entitled to merger-related discounts – a problem that was apparently originally discovered in October 2002.

The Commission should also be aware that SBC's June 19th Michigan 271 application filed at the FCC acknowledged that the scope of the present billing disputes between SBC and CLECs *for Michigan alone* was $25 million.[47] Given the fact that Michigan's billing resolution process has been under intense scrutiny for some time, the amounts in dispute in Wisconsin are likely worse, at least as a percentage of total billings. In any event, SBC's continued stream of accessible letters advising of new billing problems tell the true story, regardless of SBC's empty claims that its wholesale billing is working properly. Joint CLECs are filing at the FCC today their responses to the renewed Michigan 271 application, and will file courtesy copies with the Commission shortly so that it can be up to speed on the wholesale billing issues that have arisen and/or continued since the CLECs made their April 28th filing in this proceeding, and which SBC has not disclosed in this proceeding.

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[47] *See* Supplemental Brief in Support of Application by SBC for Provision of In-Region, InterLATA Services in Michigan, *In the Matter of Application by SBC Communications Inc., Michigan Bell Telephone Company, and Southwestern Bell Communications Services, Inc. for Provision of In-Region, InterLATA Services in Michigan*, WC Docket 03-138 (June 19, 2003) at 22.

Conclusion

For all of the foregoing reasons, the plan already found to be required in the public interest and adopted by the Commission in the OSS Order is the plan that the Commission should endorse for Section 271 purposes. The Commission should condition its endorsement of SBC's federal 271 application on SBC's acceptance of the Commission-ordered plan.

Dated: June 30, 2003

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